No. 89-7662

In The

Supreme Court of the United States

October Term, 1990

ROGER KEITH COLEMAN,

Petitioner,

v.

CHARLES E. THOMPSON, WARDEN
MECKLENBURG CORRECTIONAL CENTER
OF THE COMMONWEALTH OF VIRGINIA,

Respondent.

**On Writ Of Certiorari To
The United States Court Of Appeals
For The Fourth Circuit**

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

STATUTES

This reply brief is submitted on behalf of petitioner, Roger Keith Coleman, in support of his claim to federal review of federal constitutional error in the conduct of his trial. The Commonwealth and its chorus of amici fail to meet Coleman's demonstration that such review is not barred by his counsel's non-tactical late filing of a notice of appeal to the Virginia Supreme Court.[1]

The Virginia Supreme Court's dismissal of Coleman's petition for appeal fairly appears to interweave state and federal law. It contains no clear statement of an adequate and independent state ground. Neither respondent's repeated insistence that the decision rests solely on state law nor its analysis of Virginia law provides the missing clarity. Abandonment of the plain statement rule in search of an independent state law basis for decision is unwarranted and ultimately not fruitful.

Respondent's challenge to the application of the "cause" and the "deliberate bypass" rules consists of catastrophe metaphors rather than analysis. In fact, this case presents an opportunity for straightforward application of either rule with little, if any, sacrifice of finality and no threat of an infinite repetition of litigation or deluge of new petitions.

Finally, respondent's effort to extend *Teague v. Lane*, 489 U.S. 288 (1989), is misplaced not just in light of the scope of the grant of certiorari, but also in concept and

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[1] Respondent's Answering Brief is cited as "Resp. Br." The amicus briefs supporting respondent are cited as follows: Brief of Amicus Curiae Criminal Justice Legal Foundation ("CJLF Br."); Brief of Amicus Curiae Kentucky, et al. ("Kentucky Br."); Brief of Amicus Curiae Texas, et al. ("Texas Br.").

fact. The fact that several courts which in some fashion have (or may have) considered the merits of Coleman's claims have rejected them does not demonstrate that Coleman proposes new rules of constitutional law. *Teague* does not allow so glib a rejection of federal constitutional claims.

ARGUMENT

I.

UNDER THE PLAIN STATEMENT RULE THE COURT SHOULD PRESUME THAT THE VIRGINIA SUPREME COURT'S DECISION RESTED ON FEDERAL LAW.

A. The Virginia Supreme Court's Decision Fairly Appears To Interweave State and Federal Law.

The Commonwealth asserts that the plain statement rule does not apply to Coleman's case because the Virginia Supreme Court's decision does not fairly appear to rest "primarily" on federal law. (Resp. Br. at 9-10; see also CJLF Br. at 5, 8.) This assertion misstates Coleman's argument and rewrites both *Michigan v. Long*, 463 U.S. 1032 (1983), and *Harris v. Reed*, 489 U.S. 255 (1989).

Long makes clear that the plain statement rule applies not only when the state court decision appears to rely "primarily" on federal law, but also when a "state court decision fairly appears . . . to be interwoven with the federal law." 463 U.S. at 1040.[2] Post-*Long* interpretations

[2] In addition, it is not clear that "primarily" does not simply mean "not secondarily or alternatively", in which case respondent's argument would likewise collapse.

of the rule confirm its applicability when federal and state law are interwoven. *E.g., Kentucky v. Stincer*, 482 U.S. 730, 735 n.7 (1987) (stating predicate to test as " 'when . . . a state court decision fairly appears . . . to be interwoven with the federal law' ") (quoting *Long*, 463 U.S. 1040-41); *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2701 n.5 (1990) (finding jurisdiction where ambiguous state decision "was at least 'interwoven with the federal law' ") (quoting *Long*, 463 U.S. at 1040-41).

Respondent's motion to dismiss Coleman's appeal was based solely on the late filing (J.A. 22-24), but Coleman's opposition urged consideration of the merits to inform the Virginia Supreme Court's consideration of the motion. (Petitioner's Memorandum in Opposition to Respondent's Motion to Dismiss Appeal, dated December 18, 1986 at 14-15.) The Virginia Supreme Court then declined respondent's request for a decision on the timeliness issue before the merits were fully briefed and it did not render its decision until four months after it had a fully submitted case on the merits. Thus, when the order states that the court considered the parties' briefs on the merits as well as their papers addressing the timeliness of the appeal, it implies more than a mere list of pleadings on file.[3] It is simply not true that only the procedural issue was before the Virginia Supreme Court,

[3] This fact also defeats Texas' attempt to rely on cases in which "a state court decision . . . is silent on federal constitutional issues." (Texas Br. at 17.) Unlike those cases, in which there is no mention of federal law, the Virginia court's reference to federal law is no different than its reference to state law. It is no more "silent" on the federal law issues than it is on the state law issue.

and there is more than a fair basis for concluding that its decision resulted from an interweaving of state and federal law. (Pet. Br. at 9-14.)[4]

Indeed, the Commonwealth now concedes that the Virginia Supreme Court considered Coleman's federal claims. "The question is whether the Virginia Supreme Court *decided* the merits of Coleman's federal claims, *not* whether it merely read Coleman's merits brief or thought about the merits of his claims." (Resp. Br. at 10 n.4.) It also admits that the dismissal may have been based on alternative federal law grounds. (Resp. Br. at 7 n.3.) The acknowledgement of the possibility of a ruling on the merits is, of course, warranted; the proposition that one can conclude from the summary order that it was an alternative ruling is preposterous.[5]

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[4] In *Harris*, the Court observed that the " 'plain statement' rule relieves a federal court from having to determine whether in a given case, consistent with state law, the state court has chosen to forgive a procedural default." 489 U.S. at 265 n.11. Likewise, it relieves the federal court from having to determine whether the ruling on procedural default is driven by a determination of the federal merits.

[5] The Commonwealth does not even address the fact that the Virginia Supreme Court has in the past evaluated the federal merits in deciding whether to hear a late-filed appeal. (Pet. Br. at 11-12.) *See O'Brien v. Socony Mobil Oil Co.*, 207 Va. 707, 152 S.E.2d 278, *cert. denied*, 389 U.S. 825 (1967). As in *O'Brien*, the Supreme Court may have dismissed Coleman's appeal as untimely because it found his claims to be without merit. (Pet. Br. at 11-12.)

B. The Virginia Supreme Court's Decision Does Not Provide A Clear Statement Of An Adequate And Independent State Ground.

Given that the Virginia Supreme Court's decision fairly appears to interweave state and federal law, *Harris* requires that, in the absence of a clear and express statement of reliance on state law, federal law be presumed the basis for decision. 489 U.S. at 263. Nothing in the order, including the word "dismissed," provides a preclusive statement of reliance on state law.[6]

The Commonwealth suggests that the order's ambiguity can be cured by review of the motion to dismiss and the state law cited therein. (Resp. Br. at 14-16; see also CJLF Br. at 10; Texas Br. at 18.) In fact, review of the papers submitted on the motion to dismiss does add clarity, but not the clarity the Commonwealth seeks. As noted above, in his response to the motion to dismiss, Coleman asked the court to ignore the thirty-day requirement because of the "significant constitutional issues in his appeal." Memorandum in Opposition to Respondent's Motion to Dismiss Petition For Appeal at 14-15 (citing, *inter alia*, *O'Brien*, 207 Va. 707, 152 S.E.2d 278). If the Commonwealth is going to examine the record for evidence of what the order was really based upon, it cannot ignore this evidence. Nor can the Commonwealth's reference to its motion to dismiss erase the Virginia Supreme

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[6] Respondent's reliance on *Saunders v. Reynolds*, 214 Va. 697, 204 S.E.2d 421 (1974), as providing an explanation for the words used in Virginia Supreme Court orders is misplaced. That case does not purport to define the significance of and differences among "refusal", "dismissal" and "denial."

Court's reference in its order to the briefs on the merits or obscure the other circumstances indicating the court's consideration of the federal merits to inform its decision with respect to the timeliness of the appeal.

Respondent suggests that the order's lack of clarity should be excused because the Virginia Supreme Court did not have the benefit of *Harris'* suggested formulation for orders based on procedural default. (Resp. Br. at 16-17.) *Harris* itself dispatches that argument, noting that "state courts were familiar with the 'plain statement' requirement under *Long* [463 U.S. 1032 (1983)] and *Caldwell* [472 U.S. 320 (1985)]," both of which predate the dismissal of Coleman's appeal in 1987. *Harris*, 489 U.S. at 264. But more importantly, the validity of respondent's suggestion depends on the speculation that the Virginia Supreme Court decided Coleman's case on independent state grounds and thus would have used the *Harris* formulation. It is equally likely (perhaps more likely) that the Virginia Supreme Court would have stated that its procedural decision was informed by its view of the federal merits.

C. There Is No Reason To Limit The Application of *Harris*.

Amici urge the Court to overrule *Harris* or at least to abandon the strict application of the plain statement rule to orders issued on collateral review. (CJLF Br. at 8-15; Texas Br. at 6-16.) Such a course is entirely unwarranted.

In *Harris*, the Court wisely held that because the adequate and independent state ground doctrine is the

touchstone for both direct and collateral review, the same rule should be used in both contexts. *Harris*, 489 U.S. at 265. In reaching this conclusion, the Court considered, and rejected, the proposition that the plain statement rule should not apply on collateral review because state interests different from those on direct appeal were implicated.[7] As the Court state in *Harris*, "[w]e believe . . . that applying *Long* to habeas burdens those interests only minimally, if at all. The benefits, in contrast, are substantial." *Id.* at 264.

Both CJLF and Texas argue that *Harris* should not apply to summary orders and that federal courts should be freed to analyze state law to determine the basis of an ambiguous order. *Harris* rejected this proposition, stating "a state court that wishes to rely on a procedural bar rule in a one-line *pro forma* order easily can write that 'relief is denied for reasons of procedural default.' " 489 U.S. at 265 n.12. Furthermore, amici's argument assumes that there is a principled basis for distinguishing between "opinions" and "orders" when, in truth, there is none. The issue under *Harris* is, as it should be, the decision's clarity, not its form or its length.

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[7] Amici also argue that the plain statement rule should not apply on collateral review because adequate and independent state grounds are only a discretionary bar to collateral review. See Texas Br. at 7-8; CJLF Br. at 12. This position is illogical. The plain statement rule is aimed at easing the burden on federal courts in deciding when to review a state court decision and not at enlarging jurisdiction or affecting the exercise of discretion. *See Long*, 463 U.S. at 1041-42; *Harris*, 489 U.S. at 265.

Amici also contend that the federal habeas courts should be permitted to resolve ambiguities like the one presented here because, unlike the Supreme Court on direct review, the federal habeas courts regularly analyze and hence have greater expertise in local state law. (CJLF Br. at 9, 13; Texas Br. at 11-12.) This premise is dubious, but the argument is in any case beside the point because it is unrelated to the reasons for the Court's determination in *Harris* to apply the plain statement rule to habeas review. *Harris* was based upon an assessment of the federal courts' intrusion into the province of the state courts and the burden on federal courts of divining the meaning behind an ambiguous state court decision. *Harris*, 489 U.S. at 264-65. When, as here, a state court has actually been presented with the state law issue, "[r]equiring a state court to be explicit in its reliance on a procedural default" is less "intrusive" than is allowing "a federal court to second-guess a state court's determination of state law." *Id.* at 264. Indeed, the opinions in *Harris*, *Teague v. Lane*, 489 U.S. 288 (1989), and *Castille v. Peoples*, 489 U.S. 346 (1989), issued the same day, make clear that the Court understood how federal habeas courts review state law when it ruled that it is not appropriate for those courts to undertake their own analysis of state law after a state court has already had an opportunity to do so. *See Teague*, 489 U.S. at 299 ("The rule announced in *Harris v. Reed* assumes that a state court has had the opportunity to address a claim that is later raised in a federal habeas proceeding."). After a state court has considered the applicability of a state procedural bar and ruled thereon, the relevant question is what the ruling was, not what the state law is. Only where the latter is at issue should the

federal court undertake its own analysis of state law. (See Pet. Br. at 19 n.12.)

Finally, amici contend that the interests of finality, comity, and federalism are less affected when the Court reverses a state court in direct proceedings than when a state decision is vacated through habeas review.[8] The Court analyzed these arguments in *Harris*, 489 U.S. at 264, and decided that none of them required abandonment of the plain statement rule on collateral review.

The rule of *Harris* could not be more clear: if a state court relies on a state bar, it need only say so; if it does not say so, the federal court should presume that the federal claims before the state court were decided on their merits. That is precisely what is required in the present case.[9]

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[8] Amici ignore the other protections afforded these state interests during federal habeas, all of which were in existence when the Court decided *Harris*. The doctrine of procedural default is only the most obvious. For example, the exhaustion doctrine ensures that the state court is given the first opportunity to review a petitioner's claim, 28 U.S.C. § 2254(c) (1988), and any findings of fact made in that initial determination are accorded a presumption of correctness in federal habeas. 28 U.S.C. § 2254(d). In addition, the recent retroactivity decisions limit a habeas petitioner to federal law in existence at the time the conviction became final, a limitation not imposed on direct review. *See, e.g., Teague v. Lane*, 489 U.S. 288 (1989).

[9] Respondent argues that the Court should not find the order to be ambiguous because the lower courts' rulings to the

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II.

COUNSEL'S FAILURE TO FILE A TIMELY APPEAL SOUGHT BY THE CLIENT CONSTITUTES CAUSE.

Respondent has failed to refute Coleman's demonstration that the proper interpretation of the Court's holding in *Murray v. Carrier*, 477 U.S. 478 (1986), is that attorney conduct falling below the functional standard of attorney effectiveness set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), constitutes "cause" to excuse a

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contrary were not "clearly erroneous" and because Coleman has previously conceded the issue. (Resp. Br. at 12-13, 17-19.) Both arguments are without substance. Application of the plain statement rule is a question of law, not a finding of fact subject to the clearly erroneous standard of Rule 52 of the Federal Rules of Civil Procedure.

Second, Coleman's Petition for a Writ of Certiorari to the Supreme Court of Virginia made clear that he could not be sure as to the basis of the state court opinion:

> The Supreme Court of Virginia dismissed Petitioner's petition for appeal and denied his Petition for Rehearing, both without opinion. Accordingly, Petitioner *can only assume* that the court adopted the Commonwealth's position as articulated in its briefs.

See Cert. Ptn. No. 87-5448 at 3 n.1 (emphasis added); see also Coleman's Petition for Rehearing to the Virginia Supreme Court (order "apparently" based on the late filing). The Court in *Harris v. Reed* rejected such assumptions and required a clear and express statement of reliance on procedural default. Coleman has never conceded that the order dismissing his appeal stated an adequate and independent state ground.

procedural default. (Pet. Br. at 22-33.)[10] By basing its argument on the absence of a right to counsel during collateral review, respondent ignores the important distinction between (a) the *right* to effective assistance of counsel in state habeas proceedings and (b) whether defaults resulting from ineffective assistance of state habeas counsel should preclude federal habeas review. Coleman's argument concerns only the latter.

Recognizing ineffective assistance of post-conviction counsel as cause merely allows for the possibility of federal review of constitutional claims defaulted in state court. It does not create any new constitutional rights. Recognizing ineffectiveness as cause will not affect the number of petitions filed by state prisoners. Such claims will not submerge the courts. *Strickland v. Washington*, 466 U.S. 668 (1984), sets a very high standard for proof of ineffectiveness. Evidentiary hearings are necessary only in the exceptional cases where the claims cannot be

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[10] The Commonwealth concedes, as it must, that the right to effective assistance of counsel is a part of the safety net that ensures that application of the cause and prejudice rule will not lead to miscarriages of justice. (Resp. Br. at 33 n.16.) Its attempt to justify removal on collateral review of the net of effective counsel is of no avail; only if ineffective assistance is cause to excuse defaults at every level of state review can miscarriages of justice be avoided. *See Carrier*, 477 U.S. at 496. If ineffective assistance of state habeas counsel does not constitute cause, cases in which the petitioner has "substantial claim[s] that the alleged error undermined the accuracy of the guilt or sentencing determination," *Smith v. Murray*, 477 U.S. 527, 538 (1986), but cannot demonstrate actual innocence, will go unremedied.

decided on the pleadings. And cause alone is not sufficient; prejudice too must be established.

The Commonwealth asserts that finding ineffectiveness of post-conviction counsel to be cause will lead to never-ending litigation. (Resp. Br. at 42.)[11] That assertion is simply wrong. The successive petition and abuse of the writ doctrines give federal courts potent tools with which to manage repetitive and abusive petitions. *See* Rule 9(b) foll. 28 U.S.C. § 2254 (1988); *In re Shriner*, 735 F.2d 1236, 1239 (11th Cir. 1984) ("federal courts are not powerless to protect themselves from harassing and repetitive petitions"). It is wrong to assume that frivolous claims will overwhelm a system with such safeguards.

Nor will a holding that ineffective assistance of state habeas counsel constitutes cause burden the state courts. "Cause" is a creature of the federal, not the state, habeas system. A change in the federal system requires no corresponding change in state systems. States need not recognize ineffective assistance as cause or change their post-conviction review systems in any way.[12]

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[11] Respondent's use of the infinite mirror image from Justice Rehnquist's dissent in *Evitts v. Lucey*, 469 U.S. 387, 411 (1985), is misplaced. The dissent argued that the creation of a constitutional right to effective appellate counsel would allow petitioners to seek relief on claims that had nothing to do with the lawfulness of the conduct of their trials. Recognition of ineffective assistance as cause does not create a new constitutional right. Its function is solely to allow federal habeas courts to consider constitutional claims with respect to the lawfulness of a conviction, thus keeping focus on the trial as the main event, not layering abstract constitutional rights.

[12] It may be, as Kentucky argues, that states will be induced to provide a forum to litigate claims of ineffective

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The Commonwealth's argument that, apart from any burden on state courts, it is unfair to hold states responsible for defective habeas representation because such representation is not constitutionally required misapprehends the issue. "Cause" does *not* depend on whether the default can fairly be imputed to the state, but rather whether it is fair to charge a petitioner with a default for which he is in no sense responsible.[13] Thus, although there is no reason to hold states "responsible" when new evidence comes to light or when federal law changes, both previously unavailable facts and new law constitute cause. *See Murray v. Carrier*, 477 U.S. at 488. Similarly, where the default was caused by the conduct of

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assistance of habeas counsel. If they do, so much the better. Any improvement in the representation of prisoners is for the good and will lead to increased justice, efficiency and finality in the habeas system. If states *choose* to provide representation in response to a finding that ineffectiveness of state habeas counsel constitutes cause, the bonus of better representation will result without the intrusiveness of a federal rule mandating such representation. *Cf. Murray v. Giarratano*, 492 U.S. 1, 109 S. Ct. 2765, 2772 (1989) (Kennedy, J., concurring in the judgment).

[13] That is why respondent is wrong to rely on the fact that Coleman was represented "by a team of attorneys of his own choosing." (Resp. Br. at 40.) *Wainwright v. Torna*, 455 U.S. 586 (1982), is likewise inapposite. *Torna* did not turn on any distinction between retained and appointed counsel. Rather, *Torna* turned on the noncontroversial point that a constitutional claim cannot be created from the failure of a non-constitutionally required attorney to perfect a discretionary appeal. *Id.* at 587-88. Because Coleman does not assert any due process violation, the state's responsibility is simply irrelevant to the cause determination.

an attorney who acted outside the bounds of professionally acceptable behavior, it does not matter whether the state is "responsible" for the misconduct, for it is simply not fair in such circumstances to bar the petitioner from access to federal remedies.

Coleman has so far been barred from federal review of his substantial federal constitutional claims relating to his trial. No evidentiary hearing will be required to hold that Coleman's counsel's failure constitutes ineffectiveness.[14] No fine distinctions need be made as to whether the failure to raise or to appeal a single issue on habeas was ineffectiveness or inadvertence or strategy. No repetitive litigation will occur. No "sandbagging" has occurred, and none will be rewarded.[15]

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[14] Respondent is wrong that petitioner cannot show prejudice. Indeed, losing the right to appeal non-frivolous constitutional claims is by definition prejudice. While the state habeas court and the federal district court both ruled against Coleman's claims on the merits, neither did so with ease. Both took argument and issued detailed opinions in support of their conclusions. And the district court, by issuing a certificate of probable cause, found that Coleman had "made a substantial showing of the denial of a federal right." *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). The merits of petitioner's substantial constitutional claims of juror bias, ineffective assistance of counsel and *Brady* violations were not considered by the Fourth Circuit. No Court has held that Coleman was not prejudiced by his counsel's failure.

[15] Whether analyzed under "cause and prejudice", "deliberate bypass" or some other rubric, counsel's failure to follow petitioner's instructions to file a timely appeal is an "external impediment," that prevents the vindication of petitioner's claims. *Carrier*, 477 U.S. at 492. A petitioner cannot fairly be

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III.

THE DELIBERATE BYPASS STANDARD SHOULD CONTINUE TO APPLY TO FAILURES TO APPEAL AT ALL

The attacks leveled against the continued viability of *Fay v. Noia*, 372 U.S. 391 (1963), and its applicability to the instant case are without merit. It is submitted that the deliberate bypass rule of *Noia* has continuing utility, alongside the cause and prejudice doctrine, to determine when defaults of federal claims in the state courts will not bar federal habeas review.

Relying on *Wainwright v. Sykes*, 433 U.S. 72, 88-89 n.12 (1977), respondent asserts that the Court has limited *Noia* to its facts – surrender of the right to take a direct appeal – and that it has no application in the present circumstances of a collateral appeal. This argument overlooks the actual similarity of the defaults in *Noia* and in the present case, and is supported by neither *Sykes* nor its progeny. *Sykes* involved the "failure[] to raise individual substantive objections in the state trial," 433 U.S. at 88 n.12, while *Noia* involved the surrender by a criminal defendant "other than for reasons of tactical advantage, [of] the right to have all of his claims of trial error considered by a state appellate court." *Id.* In his opinion for the Court, Justice Rehnquist was at pains to avoid

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held responsible for such conduct. Where a petitioner does not deliberately bypass an appeal, but rather was prevented from appealing by the actions of his counsel or others, he has cause to excuse the resulting procedural default. *Cf. Jones v. Barnes*, 463 U.S. 745, 755 (1983) (Blackmun, J., concurring).

painting *Noia* out of existence with a "broad [*Sykes*] brush." *Id.* Thus, the Court rejected the "sweeping" dicta of *Noia* but expressly reserved as to its continued viability with respect to surrenders of the right to have all claims of trial error considered by a state appellate court. The Court clearly did not intend to decide in *Sykes* that *Noia* would be inapplicable to claims of the kind asserted by Coleman here.[16]

Respondent contends that because collateral review is not constitutionally mandated, use of the waiver standard of *Johnson v. Zerbst*, 304 U.S. 458 (1938), as would seem required by *Noia*, 372 U.S. at 439, is not warranted. (Resp. Br. at 21.) The premise of this argument is flawed. *Noia's* use of the *Johnson v. Zerbst* standard did not depend on there being a constitutional right to a direct appeal for there was not in 1963, and is not in 1991, such a right. *See, e.g., Evitts v. Lucey*, 469 U.S. 387, 392-93 (1985).

The default at issue here falls squarely within the purview of the deliberate bypass standard. Indeed, this case is far more like *Noia* than it is like *Sykes* or *Carrier*. The default was not deliberate and should be excused.

IV.

PETITIONER'S CLAIMS IMPLICATE ONLY WELL-ESTABLISHED RULES OF LAW.

Respondent's empty assertion that the new rule doctrine precludes federal habeas relief for Coleman need

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[16] *Murray v. Carrier*, 477 U.S. 478 (1986), applied the *Sykes* standard to the failure to raise *individual* objections on appeal but left untouched the *Noia* decision as to failures to appeal.

not detain the Court.[17] New rule analysis requires careful comparison of a petitioner's legal claims and their factual bases with the law in place at the time the petitioner's conviction became final. *Teague v. Lane*, 489 U.S. 288, 310 (1989). Far from supplying such an analysis, the Commonwealth does not even identify the new rules on which petitioner purportedly relies. Rather, respondent argues that the district court's alternative holding that Coleman's constitutional claims are without merit means, *ipso facto*, that he seeks the benefit of new rules.[18] The logical conclusion of that argument is the extraordinary proposition that lower courts always correctly apply the law and that there is no need, at least on habeas, for appellate review.

Moreover, the mere listing of petitioner's habeas claims demonstrates that respondent's "new rule" argument is without merit. Coleman's major claims are that the prosecution withheld exculpatory evidence, his counsel provided inadequate representation at all stages of the trial and sentencing proceeding, and he was denied his

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[17] If the Commonwealth has a legitimate new rule argument, the proper time to raise it was in its brief in opposition to the petition for certiorari. *See* Sup. Ct. R. 15. The Commonwealth made no such argument at that time, and the new rule issue is in no way encompassed in the three questions on which the Court granted certiorari.

[18] The Commonwealth's assertion that the "best evidence" that Coleman's claims are "susceptible to debate" is that, *inter alia*, "to some extent a unanimous panel of the court of appeals . . . found that Coleman's claims were meritless," Resp. Br. at 47, is a blatant attempt to mislead the Court. The Fourth Circuit decided the merits of Coleman's capital sentencing claim only, and that claim is no longer at issue in this case.

right to an unbiased jury by the seating of a juror who stated before the trial that he wanted to sit on the jury to "help burn the SOB." Coleman's conviction became final in 1984. *Brady v. Maryland*, 373 U.S. 83 (1963), was decided more than twenty years earlier. The right to effective assistance of counsel has long been clear. *E.g., Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980). The right to an unbiased jury is even more venerable. *E.g., Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Far from seeking the benefit of new rules, Coleman seeks federal review of claims based upon well-established constitutional rights. These claims go to the integrity of the trial process by which Coleman was convicted and sentenced to death.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the opening brief, Petitioner Roger Keith Coleman respectfully requests that the judgment of the United States Court of Appeals for the Fourth Circuit be reversed and the cause be remanded to the Fourth Circuit for further proceedings.

Respectfully submitted,

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